

TECHNICAL ASSISTANCE NOTE

No. 03-23



Jim Horne, Commissioner

Contact:
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DATE: April 23, 2003

TO: Sponsors of the National School Lunch Program

FROM: Diane Santoro, Administrator
Food and Nutrition Management (FNM)

A handwritten signature in cursive script that reads "Diane C. Santoro".

SUBJECT: Applicability of Federal Requirements to School Food Service Procurements

In August 2000, a final regulation published in the Federal Register moved the procurement procedure requirements for the Child Nutrition Programs from Department regulation 7 CFR Part 3015 to 7 CFR Parts 3016 and 3019. For your information, we have included a number of questions and answers that USDA received concerning how these requirements changed the procurement procedures for public and non-profit school food authorities (SFAs). We recommend that this information be shared with your legal council.

Question: How did regulations 7 CFR Parts 3016 and 3019 change the procurement procedures for public and nonprofit SFAs?

Answer: The Part 3016 regulation implements the concept of Federalism for public SFAs administering the child nutrition programs (CNPs). Pursuant to Part 3016.36(b), public SFAs may use their own procurement or contract procedures that reflect applicable State and local laws and regulations, as long as those procedures are consistent with the requirements found at Part 7 CFR 3016.36(b-i) and 3016.60(b-c).

A nonprofit SFA may elect to follow the procurement procedures at 3019.40-48 or use its own organizational procedures as long as those procedures are consistent with requirements of Part 3019.

Question 2: Please explain parts 3016.36(b-i) and 3016.60 (b-c).

Answer: 7 CFR Part 3016.36(b-i) establishes the minimum standards that an SFA must follow to conduct a proper procurement. These standards address such elements as the requirement that

SFAs have a written code of conduct governing the performance of employees engaged in the award and administration of contracts (3016.36(b)(3)); methods of procurement (3016.36(d)); the requirement that SFAs perform a cost or price analysis for every procurement, including contract modifications (3016.36(f)); and required contract clauses and certifications (3016.36(i)).

The requirement at 3016.60(b) allows SFAs to award a contract to a potential contractor that provided information, which was used by the SFA in the drafting of specifications, bid, proposal, procurement or contract terms. However, it prohibits the award of a contract to a potential contractor when the potential contractor actually drafted the specifications, bid, proposal, procurement or contract terms. The SFA alone is responsible for developing the documents used in conducting its procurements. 7 CFR Part 3016.60(c) prohibits the use of in-State and local geographic preferences in the award of contracts.

Question 3: Does regulation 3019 contain the same requirements and prohibitions for nonprofit SFAs?

Answer: The minimum standards nonprofit SFAs must follow in conducting procurements (3019.40-.48) are generally the same as those that apply to a public SFA. Part 3019 does not contain a corresponding prohibition to the awarding of a contract using an in-State or local geographic preference. The rationale is that it is not necessary to include this prohibition because nonprofit SFAs lack the legal standing to establish in-State or local geographic preferences.

Question 4: Do the specific procurement and contract clause requirements of the Program regulations still apply?

Answer: Yes. For example, the Part 210.16 requirements regarding the 21-day cycle menu requirement (210.16(a)(1)), specific clauses at (210.16(c)) and duration of contracts (210.16(d)) still apply to food service management company (FSMC) procurements and contracts.

Question 5: Does applying Parts 3016 and 3019 to SFA procurements change FNS's position on the crediting of discounts and rebates in cost reimbursable contracts?

Answer: No. FNS's position on this subject remains unchanged. FNS strongly encourages, but does not require that all cost reimbursable contracts include provisions to ensure SFAs are only charged net, allowable costs. The Office of Management and Budget (OMB) and the Department's Office of the General Counsel have made clear that state agencies and SFAs may impose compliance with net cost requirements through contractual terms.

Question 6: Does Federalism prevent the State agency from establishing procurement and contract requirements that SFAs must follow?

Answer: No. Consistent with the "flow down" concept of Federalism, a State agency may establish procurement and contract requirements that SFA's must follow, as long as those requirements are not inconsistent with program requirements.

Question 7: May the SFA follow 3016.36(b-i) procurement procedures instead of its own State and local requirements?

Answer: No, the SFA may not substitute 3016.36(b-i) if the State or local requirements are more restrictive.

Question 8: If State law exempts public schools from complying with State bid laws, is the SFA exempt from all procurement requirements?

Answer: No. The SFA would still be required to comply with local procurement requirements, any applicable Program requirements, and the provisions of 3016.36(b-i) and 3016.60(b-c).

Question 9: Doesn't the Federalism concept result in differences between States regarding the procurement procedures and contract requirements and even between SFAs within the same State?

Answer: While procedural practices may differ, the fundamental requirements do not. Although the Federalism principles incorporated in Part 3016 provide greater flexibility and may result in some procedural variations between States and among public SFAs within a State, such as different small purchase thresholds; the basic requirements for sound procurement and contract management remain in place and will continue to be consistently applied. Most public SFAs already operate under requirements for full and open competition and the prohibition against conflicts of interest. In addition, all school nutrition program regulations applicable to procurement and contract management, such as the requirement that federally donated commodities accrue only to the benefit of the school food service (7 CFR 210.16(a)(6)) and the Buy American requirement (7 CFR 210.21(d)) continue in effect.

With respect to all contracts, including those with FSMCs, SFAs are free to include procurement and contract management requirements in their contract with these companies. Food and Nutrition Services (FNS) strongly encourages SFAs to include in all solicitations and contracts, terms that protect the nutritional integrity of the school nutrition programs. Such terms may include requirements in cost reimbursable contracts that FSMCs, distributors and brokers obtain goods for the programs through competitive procurements and that all discounts, credits and rebates received by these contractors must be credited to the SFA's nonprofit school food service. Food and Nutrition Management has developed a prototype procurement and contract document for SFAs use.

If you have questions, please contact Irene Wimbush (800) 504-6609 or Irene.Wimbush@fldoe.org.